

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Application of SBC Communications )  
Inc. et al. Pursuant to Section 271 of the )  
Telecommunications Act of 1996 to ) CC Docket No. 97-121  
Provide In-Region, InterLATA )  
Services in the State of Oklahoma )  
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REPLY COMMENTS OF THE  
UNITED STATES DEPARTMENT OF JUSTICE

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In the wake of the Department's filing, several parties have asked the Department to clarify two aspects of our analysis: (1) whether we agree with the Association of Local Telecommunications Services as to whether Section 271(c)(1) requires facilities-based service to both businesses and residences; and (2) the importance (and meaning) of "performance benchmarks" in assessing whether interLATA entry would be in the public interest. To address any confusion on these points, the Department now files these reply comments to make the record clear.

#### I. Section 271(c)(1)'s Entry Requirements

Under Section 271(c)(1), a BOC must apply for in region, interLATA authority under either "Track A," if it receives a request for access and interconnection from "one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access [i.e., a provider intending to serve customers either exclusively or predominantly over its own facilities]) to residential and business subscribers." Section 271(c)(1)(A). If the BOC receives no such request, or establishes to the relevant state commission that the competitor making such a request failed to negotiate in good faith or violated the terms of the agreement, the BOC may proceed under "Track B." For the reasons explained in our evaluation, SBC's application is ineligible for Track B consideration, and accordingly, must be assessed under Track A's entry standards. See Evaluation of SBC's Application for InterLATA Authority in Oklahoma at 9-20 (hereinafter, "SBC Evaluation").

As a basic requirement for in region interLATA entry, Track A demands the presence of a facilities-based competitor offering service to both business and residential customers. In our

evaluation, the Department explained that SBC's application failed in this regard because Brooks Fiber, the competitors which it claimed meet this requirement, was not a "competing provider" actually serving any residential "subscribers." See SBC Evaluation at 20-21. Rather, Brooks is merely engaged in test of its ability to offer resold service by providing such service to four of its employees on a non-paying basis; as such, Brooks is not "competing" with SBC, nor is it serving any "subscribers" -- i.e., any persons paying for its service.

Although our evaluation suggests that the Commission reject SBC's application on the ground that Brooks is not a "competing" provider serving residential "subscribers," the Association for Local Telecommunications Services has pressed for rejection of SBC's application on an additional ground: that the basic requirement of a facilities-based competitor serving both business and residential customers included a sub-requirement that the facilities-based competitor serve both classes of customers -- i.e., business and residential -- over its own facilities.<sup>1</sup> Although our evaluation did not focus on this question, the Department disagrees with this suggestion, though we do not believe that the Commission need reach this issue in any event. As an initial matter, the text of Section 271(c)(1)(A) does not specify that the "facilities-based provider" must serve both business and residential customers over its own facilities. In light of the actual statutory language, it seems clear to the Department that Section 271(c)(1)(A) contemplates two basic objectives: (1) ensuring the presence of a facilities-based to test the cooperation of the BOC; and (2) requiring that the BOC face some competition for each class of customer before receiving interLATA authority under Track A. Thus, if the relevant facilities-based competitor served residential customers through resale, rather than over its own facilities, the BOC's application could still satisfy both the Act's textual requirements as well as its

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<sup>1</sup> See \_\_\_\_.

underlying purpose.

Both the legislative history and structure of the Act underscore the Department's view that the Act requires the presence of a facilities-based provider serving both businesses and residences, not facilities-based service to both businesses and residences. Indeed, Section 271(c)(1)(A)'s title reflects the section's focus on the "presence of a facilities-based competitor."<sup>2</sup> Picking up this focus, the Conference Report highlights that Congress thought it important for purposes of checklist implementation to observe, wherever possible, a competing carrier who has implemented its agreement with the BOC and is operational. See H.R. Conf. Rep. 104-458, at 148 (1996). The Report also pointed to the possibility of "meaningful facilities-based service" and explained that Track A's facilities-based competitor requirement served to "ensure a competitor offering service exclusively through the resale of the BOC's telephone service does not qualify [the BOC for in region interLATA authority under Track A], and that an unaffiliated competing provider is present in the market." Id. Again, Congress' focus on a facilities-based provider -- and not on facilities-based service to both business and residential customers -- reflects its desire to observe different forms of entry and to ensure that potential facilities-based providers have been given an opportunity to receive the statutorily services and facilities in order to become operational. See SBC Evaluation at 14-17. Finally, to impose the additional requirement, not specified in the Act, that the facilities-based provider serving both businesses and residences do so over its own facilities, would contravene the Act's basic purpose of ensuring that entrants can receive the basic services and facilities they need, without foreclosing long distance entry on

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<sup>2</sup> It is well understood that the title of a statutory provision may be suggestive of its purpose. See, e.g., Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 116 S. Ct. 637, 642 (1996).

account of the choices of the BOC's competitors. Cf. Id. at 22.

## II. The Importance of Performance Benchmarks

In articulating the Department's approach to assessing BOC applications for in region, interLATA authority, we stated that the existence of "performance benchmarks" will serve an important purpose in demonstrating that the market has been "irreversibly opened to competition." In setting forth our explanation of "performance benchmarks," "performance standards," and "performance measures," we realize that we failed to define and use each term precisely. To clear up any confusion, and to correct several of our own imprecise usages of these terms, we submit the following discussion.

At bottom, a "performance benchmark" is the "track record" of reliable service established by the BOC. Such benchmarks are significant because they reflect the ability of the BOC to perform a critical function within a measurable period of time -- for example, the provisioning of an unbundled loop. In areas where the BOC performs the same function for its competitors as it does for its own retail operations, these benchmarks may also be established. In areas that are being developed specifically to enable new entrants to compete effectively, however, these benchmarks will serve, as explained in our evaluation, the critical purpose of ensuring that the BOC adheres to its pre-entry performance record. See SBC Evaluation at 45-48.

To make "performance benchmarks" a useful tool for post-entry oversight, we also expect the BOC to adopt means of measuring their performance -- i.e., "performance measures." That is, if there are no such means in place, it will be considerably more difficult to ensure that the BOC continues to meet its established performance benchmarks. Finally, we acknowledge that there may be areas in which the present industry standards will be updated, requiring new levels of

performance. Accordingly, the Department is also focused on the importance of commitments by BOCs to adhere to "performance standards," even when they will be imposed on it post-entry. For example, and to SBC's credit, our evaluation noted that they have agreed to "implement new industry standards within 120 days of their becoming final." SBC Evaluation at 73.

To reflect the above typology, our evaluation should be modified as follows:

45 line 2 of heading "b." (and Table of Contents), **"standards" to "benchmarks"**

47 line 3, **"measures" to "benchmarks"**

47 line 5, **"measures" to "benchmarks"**

48 line 9, **"measures" to "benchmarks" and add "as well as its commitment to adhere to certain performance standards."**

60 line 9, **"measures" to "benchmarks"**

60 lines 11, 15, 18 **"standards" to "measures"**